



9110-04-P

**DEPARTMENT OF HOMELAND SECURITY**

**Coast Guard**

**33 CFR Part 117**

**[Docket No. USCG-2018-0128]**

**RIN 1625-AA09**

**Drawbridge Operation Regulation; Ebey Slough, Marysville, WA**

**AGENCY:** Coast Guard, DHS.

**ACTION:** Final rule.

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**SUMMARY:** The Coast Guard is modifying the operating schedule that governs the Burlington Northern Santa Fe Railroad (BNSF) Bridge 38.3 across Ebey Slough, mile 1.5, at Marysville, WA. The modified schedule removes the bridge operator at the subject drawbridge, and will change from on-demand opening to a four hour advance notice for opening.

**DATES:** This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** To view documents mentioned in this preamble as being available in the docket, go to <http://www.regulations.gov>. Type USCG-2018-0128 in the "SEARCH" box and click "SEARCH." Click on Open Docket Folder on the line associated with this rulemaking.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this rule, call or e-mail Steven M. Fischer, Bridge Administrator, Thirteenth Coast

Guard District Bridge Program Office, telephone 206-220-7282; e-mail d13-pf-d13bridges@uscg.mil.

## **SUPPLEMENTARY INFORMATION:**

### **I. Table of Abbreviations**

CFR	Code of Federal Regulations
DHS	Department of Homeland Security
FR	Federal Register
NPRM	Notice of Proposed Rulemaking
§	Section
U.S.C.	United States Code
BNSF	Burlington Northern Santa Fe Railway

### **II. Background, Purpose and Legal Basis**

On March 12, 2018, we published a NPRM entitled “Drawbridge Operation Regulation; Ebey Slough, Marysville, WA,” in the Federal Register (83 FR 12305). We received one comment on this rule. This comment was received May 8, 2018, and included several objections. BNSF submitted a rebuttal to us on June 1, 2018, addressing each objection. We have read both submittals from each party, and will discuss the material herein.

The Coast Guard is issuing this rule under authority in 33 U.S.C. 499. BNSF requested a change to the operating schedule of the BNSF Railroad Bridge 38.3 across Ebey Slough, mile 1.5, in order to save on operating costs for the bridge. The regulation will allow BNSF to operate without a bridge operator attending the bridge until an opening request has been received, and allow BNSF’s bridge operator to open the swing span within four hours after receiving a request for an opening. Marine traffic on Ebey Slough consists of vessels ranging from small pleasure craft, small tribal fishing boats and occasionally medium size

pleasure motor vessels.

### **III. Legal Authority and Need for Rule**

The Coast Guard is issuing this rule under authority 33 U.S.C. 499. The BNSF Bridge 38.3 across Ebey Slough, mile 1.5, at Marysville, WA, currently operates in accordance with 33 CFR 117.5. This bridge provides a vertical clearance approximately 5 feet above mean high water and approximately 16 feet above mean low water when in the closed-to-navigation position. The Coast Guard will add the vertical clearances in the Coast Pilot. Vertical clearance in the open-to-navigation position is unlimited. During July 2017, a BNSF supervisor contacted the District Bridge Office via a phone call enquiring about a rule change for the subject bridge due to a low number of openings. In 2015, the number of bridge openings was 128, and each year afterward, the number of openings have progressively been less. The City of Marysville closed the only marina upriver from the swing bridge in 2016, and that year the bridge opened 48 times, and most of those openings were for relocating vessels leaving the marina. At the time BNSF submitted a rule change request in August 2017, only two vessel opening requests were received. However, after reviewing updated bridge logs for this rule change, we identified a total of five openings. This rule change to request at least a four hour notice to open the subject bridge will lower operating cost, and the waterway use supports this rule.

### **IV. Discussion of Comments, Changes and the Final Rule**

Part of the comment submitted stated our NPRM was devoid of BNSF's written request. Our NPRMs do not include the bridge owner's written request,

and anyone may request a rule change. The Coast Guard published the NPRM based on facts open to public comment, allowing ample opportunity for review. The comment continues with six objections, the following addresses these objections with BNSF's rebuttal and our determination:

- A. The commenter objects to removal of the bridge tender on the basis that the bridge tender performs routine day-to-day maintenance and inspection, assuring that the bridge operates as intended. Without the bridge tender, there are increased chances for mechanical failure leading to a halt in maritime traffic. USCG disagrees. The bridge operator's responsibility and/or role to perform day-to-day routine maintenance, inspection, repairs and in ensuring the swing span will open is irrespective of the mariner notice time to open the bridge. In the event of a mechanical failure, multiple BNSF employees are available to respond, including BNSF maintenance crews, bridge and track inspectors, and supervisors. This response to execute repairs is not changed by this rule. The subject bridge is cycled open and closed on a periodic bases to ensure the operating status as required by 33 CFR 117.5. This rule will not impact the operation of the bridge or change BNSF's responsibility to maintain the bridge.
- B. The commenter discusses the issue of trespassers who use the bridge for fishing, and freight trains depositing debris and trash on the bridge, both of which are removed and handled by the bridge tender. The commenter asserts that without the bridge tender's actions, there are

significant safety concerns. USCG disagrees. Potential trespassing and debris scattered on the subject bridge are hypothetical situations that may or may not occur. Nevertheless, other unmanned bridges within the district clear debris and have trespassing issues with no impact to reasonable navigation. Furthermore, Federal no trespassing signage is installed at each bridge.

- C. The commenter raised the issue of the high number of pleasure crafts utilizing the waterway, and how those watercrafts may try and utilize the waterway without requesting an opening. The Coast Guard has determined that the use of Ebey Slough has progressively lessened over a few years, as stated in section III. We contacted local authorities asking what type of vessels have been seen using this waterway, and they answered kayaks and small outboard motor boats. These vessels have not or typically have not requested bridge openings. At high tide, 5 feet is enough vertical clearance for these types of vessels to transit under the swing span. In 2016 and 2017, only two vessels routinely requested an opening, and those opening request were given more than four hours prior to needing the swing span to open. Other pleasure vessels did request openings in 2016, but after the marina was closed, those vessels no longer transit through Ebey Slough. The marina was the only small business on this part of Ebey Slough. We also stated in the NPRM that an alternate route is available via Steamboat Slough or Union Slough. Whether or not a

vessel requests an opening on demand or four hours prior to arriving at the subject bridge, mariners are responsible for knowing and following the notification for bridge operating rules. All mariners are responsible for and encouraged to report bridge opening delays or non-opening issues.

- D. The commenter states that the NPRM did not disclose how a mariner may contact BNSF for the subject bridge operations or emergencies. That omitted information was an error on our part. BNSF agrees to install signs at the subject bridge that will state, "Call BNSF Bridge 37.0 at Snohomish River mile 3.5 at 425-304-6613, or use VHF CH 13 for bridge opening requests. In case of an emergency, call 800-832-5452".
- E. The commenter states that with just a four hour notice, without a tender on site for operation, a qualified tender may have to travel far to Ebey Slough. Furthermore, the commenter states that BNSF may lose availability of qualified bridge tenders due to this change in the regulation. The Coast Guard disagrees, as BNSF made the request of at least four hours of notification to open the swing span of the subject bridge. By the Coast Guard approving this rule, the burden falls on BNSF to follow the rule or will be in violation and subject to civil penalties. BNSF has stated they have qualified bridge operators within four hours of Ebey Slough residing near Marysville/Everett, WA.

Moreover, BNSF has a demonstrated history of meeting this same time requirement at a nearby bridge across Steamboat Slough.

F. This rule will amend 33 CFR 117.1059 to provide specific requirements for the operation of BNSF Railroad Bridge 38.3. These specific requirements are in addition to or vary from the general requirements that apply to all drawbridges across the navigable waters of the United States. This rule reasonably accommodates waterway users while reducing BNSF's burden in operating the subject bridge, and supports the current usage of Ebey Slough. We have not identified any impacts on marine navigation with this rule. An alternate route is available into Steamboat Slough and/or via Union Slough at high tide.

## **V. Regulatory Analyses**

We developed this final rule considering numerous statutes and Executive order (s) related to rulemaking. Below we summarize our analyses based on these statutes and Executive order (s), and we discuss First Amendment rights of protestors.

### **A. Regulatory Planning and Review**

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive Order 13771 directs agencies to control regulatory costs through a budgeting process. This rule has not been designated a "significant regulatory action," under Executive Order

12866. Accordingly, it has not been reviewed by the Office of Management and Budget (OMB) and pursuant to OMB guidance it is exempt from the requirements of Executive Order 13771. This regulatory action determination is based on the ability for the bridge to open on signal after receiving at least four hours advanced notice, and not delay passage of any mariner. Vessels not requiring an opening may pass under the bridge at any time. Alternate routes are available, as stated herein.

#### B. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard received no comments from the Small Business Administration on this rule. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule would not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the bridge may be small entities, for the reasons stated in section IV.C above, this rule will not have a significant economic impact on any vessel owner or operator. The only small entity that could have been impacted on this part of Ebey Slough, and used the BNSF Bridge 38.3, closed in 2016. No other entities are near the subject bridge, or use this part of the waterway. Ebey Waterfront Park has a public boat



ramp less than 200 yards upriver from the subject bridge. Mariners and marine businesses were informed of the NPRM via publishing a notification in the Local Notice to Mariners from March 21, 2018 to May 22, 2018, and no comments were submitted by any small entities. The only comment received was from a union group representing the bridge operators, and that comment with objections were addressed in Section IV.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104-121), we want to assist small entities in understanding this rule. If the rule will affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the FOR FURTHER INFORMATION CONTACT, above.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1-888-REG-FAIR (1-888-734-3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

### C. Collection of Information

This rule calls for no new collection of information under the Paperwork

Reduction Act of 1995 (44 U.S.C. 3501-3520.).

D. Federalism and Indian Tribal Government

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. No comment were received from the published NPRM in regards to this section.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of \$100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule

elsewhere in this preamble. No comment were received from the published NPRM in regards to this section.

#### F. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023-01 and Commandant Instruction M16475.ID, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321-4370f), and have made a determination that this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule simply promulgates the operating regulations or procedures for drawbridges. This action is categorically excluded from further review, under figure 2-1, paragraph (32) (e), of the Instruction. A Record of Environmental Consideration and a Memorandum for the Record are not required for this rule.

#### G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the “For Further Information Contact” section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

#### List of Subjects in 33 CFR Part 117

Bridges.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 117 as follows:

## PART 117—DRAWBRIDGE OPERATION REGULATIONS

1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05-1; and Department of Homeland Security Delegation No. 0170.1.

2. In § 117.1059 add paragraph (g) to read as follows:

§ 117.1059 Snohomish River, Steamboat Slough, and Ebey Slough.

\* \* \* \* \*

(g) The draw of the Burlington Northern Santa Fe Railroad Bridge across Ebey Slough, mile 1.5, near Marysville, WA, shall open on signal if at least four hours notice is given. The opening signal is one prolonged blast followed by one short blast. During freshets, a draw tender shall be in constant attendance, and the draw shall open on signal when so ordered by the District Commander.

David G. Throop,  
Rear Admiral, U.S. Coast Guard,  
Commander, Thirteenth Coast Guard District.  
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